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No. 609

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION BY RESPONDENTS STARRS AND BEATTIE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis-Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

BRIEF OF RESPONDENTS STARRS AND BEATTIE IN OPPOSITION TO PETITION FOR CERTIORARI

The "Statement" in the Petition for Writ of Certiorari (pages 5-13) hardly conforms either to the Mandate of Rule 23(1)(e) to present "the facts material to the consideration of the questions involved" or to the requirement of Rule 23(4) for a presentation "with accuracy, brevity and clearness whatever is essential".

Second-generation lawyers are taking over this litigation, bringing to mind the observation of Cardozo, J., in *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980, 982 (1927):

> "The half-truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten."

The "qualifications * * * disregarded or forgotten" in the "Statement", so far as Respondent Starrs is concerned are, simply, these: No act of Respondent Starrs as Receiver took place without its having been preceded by a petition to the Trial Court, formal objections thereto by Petitioners herein, argument, entry of order by the Trial Court, appeal by Petitioners to the Michigan Supreme Court, and dismissal or denial of appeal. Thus the constantly-repeated charge in the "Statement" that Respondent Starrs acted in a described manner, "wrongfully using the power possessed by him as Receiver", is seen to be divergent from fact. As for fees, described at page 12 of the

Petition as "exorbitant", careful examination of the Record will disclose that a $12,500 fee was paid Respondent Starrs in 1959, following petition to the Trial Court, objections by Petitioners herein, entry of order, appeal to Michigan Supreme Court under Calendar number 48,332, and order dismissing the appeal by the Supreme Court on November 24, 1959, with no petition for certiorari to this Court following. Examination of the record will also disclose that while at page 12 of the Petition, it is charged that Respondent Starrs "now claims additional fees of $60,000", petitioners herein, along with all other litigants, agreed (Appendix A hereto) to such fees (which have not yet been paid). Many, but not all, of the orders authorizing Respondent Starrs to perform the acts which are now alleged to be part of a conspiracy to deprive petitioners of their civil and constitutional rights, are reproduced in the record as printed for use of the court below and filed with this court under Rule 21(4).

There was a summary judgment entered in the Trial Court in favor of Respondent Starrs. Petitioners' "Statement", at page 12, indicates only that they are appealing from orders dismissing their Complaint. Whether they intend to appeal from such Summary Judgment, *quaere,* but simple prudence dictates recognition at this point that Respondent Starrs has been served with the petition, indicating dissatisfaction, however clumsily expressed, with the results below, at least *vis-a-vis* him.

REASONS FOR DENYING WRIT

"Do go on," T. S. Eliot has his psychiatrist say in *The Cocktail Party*, "you tell me a great deal by what you do not say."

The petition herein tells a great deal by what it does not say.

It does not say that in 1959 a decree quieting title to the premises involved herein was entered by the Supreme Court of Michigan following opinion reported in *Harvey v. Lewis*, 357 Mich. 305, 98 N.W. 2d 599. No petition for certiorari followed.

It does not say that in 1961 petitioners sought to vacate the 1959 decree of the Supreme Court on the ground it violated their constitutional rights. It does not say that such petition to vacate was denied and that no attempt at certiorari was made.

It does not say that in early 1963, all the parties litigant in the basic case, excluding the court appointees (the Receiver, his Counsel, and the Guardian Ad Litem) and mere claimants, settled their differences by a consent order, copy of which is appended hereto as Appendix A, by the terms of which certain matters were "finally and conclusively determined" as follows:

1. The account of Respondent Starrs as Receiver through June 30, 1962, was allowed as stated;
2. The petition of Respondent Starrs for fees as Receiver was allowed in the sum of $60,000 for the period ending February 25, 1963, fees for his counsel, Respondent Beattie, were allowed in the sum of $26,500 for the period ending February 23, 1963;

3. Respondent Starrs' petitions for assessment of special costs against plaintiffs in both trial and Supreme Courts were dismissed with prejudice; Respondent Starrs' petition for collection of indebtedness from Respondents Lewis and for sale of their stock in one of the litigant corporations was dismissed with prejudice; Respondent Starrs' claim against the Estate of one of the Respondents Lewis was dismissed with prejudice; Respondents Lewis' petition for recomputation of indebtedness was dismissed with prejudice;

4. Legal and equitable title to the premises involved in this litigation, as determined by the Supreme Court Decree of December 8, 1959, was found to be in Brookdale Cemetery Association, "free of the claims of any of the parties hereto in said land, except that of John R. Starrs as Receiver";

5. The percentages of interest of the real parties litigant was adjusted;

6. Paragraphs 12 and 13 of such order recite:

> "12. That this Order adjudicating the rights of the parties beneficially entitled to ultimate distribution is entered upon the consent of all of the parties entitled to ultimate distribution, to the end that each of said parties shall, as against the others of said parties, quietly enjoy and receive upon ultimate distribution, the stated percentages.
>
> "13. That if there be conflict in this Order with any prior order of this Court, the provisions hereof shall govern notwithstanding.''

It does not say that no attempt, abortive though such might be, to appeal from Appendix A, was ever made.

No claim has ever been made that Appendix A, which raised the percentage interest of petitioners from 6.25% in Brookdale, Inc. (a holding company) to 35%, was entered by reason of anything except the consent of all the parties, freely arrived at. The record discloses that the Trial Judge insisted upon petitioners being present in Court in person and placing their consents on the record before Appendix A was entered.

The claim of constitutional rights being violated has been made and denied, and no attempt at certiorari from such denial has been made these six long years. As observed in 1958 by the Sixth Circuit in *Worley v. Dunn*, 252 Fed. 2d 712, 714 (certiorari denied, 358 U.S. 848):

> "When litigants have had their day in court and a final judgment entered, the successful party and the court should not be burdened with successive efforts thereafter to relitigate the same issues."

If, for the purposes of argument, we presume that there was no hearing on the rights question, the action of petitioners in approving the settlement agreement embodied in Appendix A precludes them, by elementary rules of estoppel, from raising such issues in the District Court or, *a fortiori*, in the Court of Appeals or in this Court.

Petitioner's claim of denial of due process assumes in their favor the very point of local property law decided against them many years ago. See *Marquez v. Aviles*, 252 Fed. 2d 715, 716 (1st Circuit, 1958).

The comment of the late Justice Butzel of the Michigan Supreme Court in *Attorney General v. Taggart*, 306 Mich. 432, 11 N.W. 2d 193 (1943) comes to mind:

> "In various ways, it has been sought to impress upon the court the thought that this is an extremely important case, upon the outcome of which depend the rights and privileges not only of the immediate parties, but of many others. * * * It has been well

> said: 'For a party (and sometimes for his counsel), litigation has more refractory power than any other medium.' Human nature being what it is, all those definitely interested in the outcome as partisans of either side tend to become victims of an autogenous hemiopia rooting in their personal emotions, which firmly establishes the conviction that their own side is obviously and completely right * * *."

Respondent Beattie was the court-appointed counsel for Respondent Starrs. Respondent Beattie's activities were all performed as such counsel. Everything said concerning the position of Respondent Starrs is, *a fortiori*, applicable to the activities of Respondent Beattie.

CONCLUSION

It is submitted that the District Court was right when it dismissed the Complaint as to Respondent Beattie and entered a Summary Judgment in favor of Respondent Starrs. Its opinion (R. 242a-251a; not appended to the petition for certiorari) sets forth the reasons succinctly.

It is submitted that the Court of Appeals was right when it dismissed the appeal as frivolous (Appendix A-1 to petition for certiorari; pages 29-31).

The matter being almost a classic case of *res adjudicata*, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Detroit, October 6, 1967.